SUPREME COURT, U. S.

DEC 20 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 860

LEWRON TELEVISION, INC.,
A BODY CORPORATE OF THE STATE OF MARYLAND,

Petitioner,

v.

D. H. OVERMYER LEASING CO., INC.,
A BODY CORPORATE OF THE STATE OF DELAWARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRAYER FOR WRIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-titled case on September 24, 1968, to consider whether the court below correctly applied recent amendments to Rule 56(e) of the Federal Rules of Civil Procedure to a vital and undecided procedural question, of vast importance to all litigants in Federal courts, the proper resolution of which will have a salutary effect on prompt administration of justice in cases in which summary judgment is appropriate.

CITATION TO OPINION BELOW

The opinion of the District Court for the District of Maryland is unreported. It is printed at App. 1a-7a to this Petition. The opinion of the United States Court of Appeals for the Fourth Circuit is apparently unreported, as of December 11, 1968, and is printed at App. 8a-16a.

JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was entered on September 24, 1968. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit err in assuming the existence of extrinsic evidence in a summary judgment proceeding notwithstanding the failure of the Respondent to file an affidavit as required by Rule 56(e).

RULE INVOLVED

Rule 56(e) "FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answer to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule,

must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

STATEMENT OF THE CASE

Petitioner filed suit in the Superior Court of Baltimore City to collect amounts due under a contract to provide remote color television facilities to Respondent. Respondent filed a general issue plea which did not specifically deny any of the allegations in the Petitioner's Declaration, but simply stated that it "was not indebted as alleged". Respondent removed the action to the United States District Court for the District of Maryland on the basis of diversity of citizenship and an amount in controversy in excess of $10,000. Thereafter both parties moved for summary judgment.

Petitioner filed affidavits and other documents deemed adequate by the District Court to establish its right to a summary judgment. Respondent did not at any time file an affidavit supporting its motion, opposing Petitioner's motion, or an affidavit stating why such information could not be obtained prior to the hearing. In effect, Respondent made no effort to show the existence of a genuine triable issue nor did it allege the existence of any facts that would allow the District Court to come to any conclusion other than the one it reached — that the facts before the court entitled Petitioner to summary judgment and that if the Respondent had "facts which would throw doubt on the language of the agreement, he has not come forward with the same" (App. 6a). The United States Court of Appeals reversed and remanded for a trial on the merits, exhorting counsel to resort to "extrinsic aids to construction . . .," ignoring Petitioner's argument with respect to Rule 56(e) (App. 14a).

ARGUMENT

The amendment to Rule 56(e), requiring the filing of opposing affidavits in order to raise questions of fact on a motion for summary judgment was adopted because a line of cases, particularly in the Third Circuit, had held that a mere allegation in the pleadings was sufficient to create a genuine issue as to material facts and thus prevent summary judgment, notwithstanding the failure of one party to file affidavits to counter evidentiary matter presented by his opponent.

The purpose of Rule 56 is to pierce the formal allegations of the pleadings and reach immediately the merits of a controversy, and if pleading allegations or contentions made by counsel are sufficient to raise a genuine issue as against uncontradicted evidentiary matter, the summary judgment procedure is rendered a nullity. *Engl v. Aetna Life Ins. Co.*, 139 F. 2d 469 (2d Cir., 1943). The overwhelming view of the cases and the commentators is that if a motion for summary judgment is made and supported by depositions or affidavits, the opposing party must make a similar presentation to show the existence of a genuine issue or have summary judgment rendered against him. The amendment to subdivision (e), Rule 56, makes it clear that pleading allegations cannot, in themselves, create a genuine issue of material fact when summary judgment is sought, and the purpose of the amendment is to stimulate more frequent and effective use of the device as urged by the Judicial Conference of the United States in its Report of September, 1948, pp. 36-37. See 6 Moore's Federal Practice, pp. 56.01(9) (2d Ed.).

Petitioner asserts that the effect of the decision of the United States Court of Appeals for the Fourth Circuit in the instant case relied, not upon allegations contained in

the pleadings, but upon arguments advanced by counsel, none of which involve the allegation of any factual matters, but relate solely to interpretation of the contract. The summary judgment remedy is not unlike a directed verdict by a trial court, in which the court decides, prior to trial that there are no factual differences which warrant a trial by jury. Had there been a jury trial and had Petitioner received a directed verdict, then the action of the Court of Appeals in reversing the decision of the District Court would not be questioned. But the Court of Appeals was not called upon to decide whether or not the trial court was correct in holding that the contract was clear and unambiguous and that the matter did not require a jury verdict. Rather, the question presented to that Court was whether there were any factual differences between the parties that would have required submission of the matter to a jury. In reaching its decision, the Court of Appeals erred in assuming the possible existence of evidence that might raise a factual issue and ignoring the failure of the Respondent to carry its clear and plain burden to come forward with such evidence if such evidence existed.

The opinion of the District Court indicates that "here the Plaintiff [Petitioner] has supported its motion for summary judgment by affidavit wherein is contained a statement of the facts as they relate to the contract and the subsequent riders. Defendant's [Respondent's] motion incorporated by reference the essential facts set out in the Plaintiff's papers and none of the facts relating to either the contract itself or relating to the circumstances surrounding the contract was called into dispute. At the hearing on this motion, the Defendant opposed the granting of summary judgment on the basis that the determination of how the $60,000 was to be applied under the contract involved the interpretation of the contract, and consequently, was an issue of fact not to be determined by the Court" (App. 5a).

The District Court, after discussing the difference between a factual issue resulting from unclear or ambiguous language, and an issue arising from factual allegations based upon extrinsic evidence raising a question as to the meaning of the contract, concluded that a "reasonable man reading the clear language of the contract could determine the issue before the court in only one way. The four corners of the contract do not present an ambiguity which would warrant this court to hold that there is an inference that the defendant was to have the advanced payment applied to payments and sums due and owing prior to termination." Because the facts before the court were not in dispute, the District Court concluded that summary judgment was appropriate, reasoning as follows:

> "If the defendant has facts which would throw doubt on the language of the agreement, he has not come forward with the same. In *Minnesota Mining and Mfg. Co. v. United States Rubber Co.*, the court held that 'mere denials unaccompanied by facts which would be admissible in evidence at a hearing are not sufficient to raise a genuine issue of fact." 279 F. 2d 409, 415 (4th Cir. 1960). In the same case the court quoted with approval *Bros, Incorporated v. W. E. Grace Mfg. Co.*, 261 F. 2d 428 (5th Cir. 1958):
>
> > 'But if, on the other hand, there is by presentation of factual e identiary details having the substantial characteristics of receivable evidence as compared with conclusions, a convincing showing that no real genuine controversy on the decisive facts exist, a mere formal denial is but a pretended one, and is insufficient. In that situation the respondent must come forward with facts of his own'."

In finding that the District Court erred, the Court of Appeals assumed the existence of extrinsic evidence, other than that before the District Court, and that resort must be had to extrinsic aids to construction and the parties given

an opportunity to develop them at trial. The substance of the opinion of the Court of Appeals states that:

> "It is significant that in all of the affidavits in support of and in opposition to the motion and cross-motion for summary judgment, including the affidavit which Overmyer contends the district court erroneously refused to strike, there is an almost total lack of reference to the contemporaneous statements of the parties, memoranda or correspondence which passed between them, their subsequent acts or their negotiations prior to agreement on the rider — in short, any extrinsic aids in the construction of the contract documents — to shed light on how the advance payment of $60,000 was to be treated in the event that, as happened here, Overmyer exercised the right of cancellation during the initial thirteen week period."

The hard fact of the matter is that the extrinsic evidence which the Court of Appeals assumes must have existed — contemporaneous statements, memoranda, correspondence, subsequent acts, negotiations — in short, any extrinsic aids —does not exist. As the Petitioner's affidavit indicates, the rider was drawn to meet a problem that arose on February 16, 1967, one day after Overmyer's right to cancel the agreement expired, and on the following day — February 17, 1967 — the parties met in New York to resolve the difficulty. There simply is nothing, other than the rider itself, to which anyone can refer to determine the intent of the parties. Had such evidence existed, the Respondent would most certainly have filed, as it was required to do by Rule 56(e), opposing affidavits containing such matters, or at the very least, alleging their existence, as it had every right to do, under Rule 56.

The District Court properly assumed that no extrinsic evidence existed and decided the case on the basis of the terms of the written instrument. The Court of Appeals decided summary judgment was not appropriate solely be-

cause it assumed the existence of various extrinsic evidence from which intent could be inferred when in fact no such evidence existed. If it had, the Respondent would have filed a Responsive affidavit, but Respondent did not and the Petitioner asserts that it could not, in good conscience, have filed a responsive affidavit. Nevertheless, the parties have been directed by the Court of Appeals to produce extrinsic evidence in a case where none exists. The record is scant because the evidence is scant, and the parties have already placed before the court all of the evidence in their possession. The Respondent did not file a responsive affidavit because there is nothing it could say, without committing perjury, which would in any way alter any of the facts contained in petitioner's affidavits in the District Court, nor are there any other facts the Respondents could rely upon to contend for any other result than that reached by the District Court.

The Respondent could, and can, contend that the agreement meant something other than that deduced by the District Court but to produce evidence — documents, writings and witnesses — in support of that contention is an utter impossibility. The Court of Appeals assumed that such evidence existed, notwithstanding Respondent's failure to allege the existence of such evidence, and in making that assumption the court ignored the clear mandate of Rule 56(e) which requires that summary judgment be rendered against any party who contends that summary judgment is inappropriate but nevertheless fails to file affidavits establishing such facts.

As a result of the Circuit Court's decision, the parties in the District Court are required to submit the matter to a jury trial on an issue, in effect, already determined by the District Court. Because the summary judgment procedure was adopted to avoid just such a contingency and because

Respondent has failed to comply with the procedural requirements imposed by Rule 56(e), we submit that the decision of the United States Court of Appeals for the Fourth Circuit in this case was erroneous and that the failure of that court to apply the provisions of Rule 56(e) requires corrective action on the part of the United States Supreme Court, not only to correct plain error in the court below, but to clarify the effect of Rule 56(e) as it applies to litigants in substantially similar positions as Petitioner.

CONCLUSION

For these reasons we pray that the petition be granted and that a writ of certiorari be directed to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

EDWARD L. BLANTON, JR.,

Counsel for Petitioner.

APPENDIX

OPINION AND ORDER OF DISTRICT COURT

(Filed October 11, 1967)

Northrop, District Judge:

In 1966, the defendant, D. H. Overmyer Leasing Co., Inc., a Delaware corporation, was attempting to organize a fourth network, to be known as the Overmyer Network. The first program on the network was to be a two-hour show originating from Las Vegas, Nevada, to be known as the "Las Vegas Show". To carry out this project the defendant entered into negotiations with the plaintiff, Lewron Television, Inc., a Maryland corporation, for the leasing of remote color television facilities. The product of these negotiations was the contract of the parties, dated October 17, 1966.

Paragraph 2 of the contract, as finally amended on March 16, 1967, provided for the payment of $17,000.00 per week for the leasing of the television equipment commencing on May 1, 1967, for a thirteen-week period. The defendant was further obligated by Paragraph 3 to pay overtime and penalty pay required under the union contract, along with living expenses up to $25.00 per day, for two technical supervisors employed by the plaintiff who were to be made available with the leased facilities. As noted by both parties, the various other provisions of the contract, pursuant to which large sums of money had been paid, are not relevant to the question before the court.*

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* These include:

1) An $11,050 deposit which was made at the execution of the original contract pursuant to § 17 of the agreement which provided that the deposit would "be deducted from the final installment" of the thirteen week period. This provision was amended by the February 18, 1967, rider to the effect that the plaintiff was to retain the deposit for its own account unless the agreement was *extended for an additional thirteen week period.* (Emphasis supplied.)

2) Escrow account deposits had been made by the defendant on two occasions to cover the payments due for the use of the facilities

From the beginning the defendant experienced various impediments, all of which were understandable in light of the nature of the venture. Early in 1967 the defendant was attempting to assign its interest in the contract, but was having considerable difficulty because of the size of the liability to which it had originally committed itself. Paragraph 13 of the contract provided that

> "Any provision to the contrary notwithstanding Overmyer shall have the right, at any time, to terminate this agreement on thirty (30) days' written notice to Lewron, in which event Overmyer's liability shall be limited to the payments set forth herein for such balance as may remain of the then current thirteen (13) week cycle . . In such event, Lewron agrees to exert its best efforts to use the facilities elsewhere, and all net revenues and savings shall reduce Overmyer's obligation under this paragraph."

While the defendant did have a right to terminate the agreement under this clause of the contract, the clause clearly subjected defendant to liability, regardless of when he opted to terminate, for thirteen weekly installments, an amount totaling $221,000, less any net revenues and savings obtained by Lewron's leasing the facilities elsewhere.

These undisputed circumstances led to the execution of the February 18, 1967, rider to the contract. It is here noted that the negotiations for the rider were initiated by the defendant, the rider was drawn up by the defendant, and the instrument was finally executed in the New York offices of the defendant.

The first paragraph of this rider states:

> "The modifications to the agreement of October 17, 1966, and the rider dated November 22, 1966, set forth in this rider, shall become effective upon the payment by Overmyer to Lewron on or before February 24,

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for that period preceding the commencement of the thirteen week period covered by the agreement. The plaintiff received from this account on April 1 and April 30, 1967, sums totaling $54,501.88.

> 1967, of $60,000.00, *said payment being the consideration for this rider.* If said payment is not made, this rider shall be null and void." (Emphasis supplied.)

The court notes that the $60,000.00 was in fact paid.

For its paying the $60,000.00 defendant derived various benefits which are clearly set out in the rider. First, paragraph 6(b) of the rider amended paragraph 13 of the original contract (set out above) which subjected the defendant to a liability in the neighborhood of at least $221,000.00. Paragraph 6(b) of the rider states:

> "Any provision to the contrary notwithstanding, Overmyer shall have the right: . . . (b) During the thirteen week period commencing April 3, 1967 [changed to May 1, 1967, by the rider dated March 16, 1967] to terminate this agreement on 7 days' prior written notice to Lewron, in which event Overmyer's liability shall be limited to payments due prior to the effective date of said 7th day notice, and in no event shall Lewron be required to refund any payments theretofore made to Lewron."

This amendment to the contract effectively limited defendant's potential liability under the contract in that it obligated him, after paying the $60,000.00, only to those sums due and owing prior to the effective date of any subsequent cancellation, rather than for the entire thirteen week period.

Second, paragraph 2 of the rider provided that while the defendant would be liable for weekly payments of $17,000.00, the $60,000.00 payment would be applied to the installments due for the final four weeks of the thirteen week period [if the contract was carried through to its completion], namely June 5, 12, 19, and 26. A subsequent rider, dated March 16, 1967, changed the commencement date of the contract from April 3, 1967, to May 1, 1967, and also provided that the $60,000.00 payment would be applied as follows: On July 3, 1967, the plaintiff would credit the defendant with $9,000.00, against the payment

due on that date, i.e., $17,000.00, and on each Monday thereafter, July 10, 17, and 24, the plaintiff would credit the defendant's account to the sum of $17,000.00.

Because of the resultant lessened liability provided for in the rider, the defendant was able to assign its interest in the contract to United Network Co., a limited partnership with offices in New York city, on March 3, 1967, and, according to paragraph 7 of the rider dated March 3, 1967, the defendant was to remain liable for all the payments due regardless of any assignment of the contract. Consequently, when the United Network Co. was in default under the contract after the first three weekly installments were paid for the weeks commencing May 1, May 8, and May 15, the plaintiff notified the defendant. The defendant, however, did not exercise its rights to terminate pursuant to paragraph 6(b) of the February 18 rider until June 2, 1967.

It is not disputed that up to the time of the effective date of termination the sums due the plaintiff were $51,000.00 for the weekly installments for the periods commencing May 22, May 29, and June 5, and $6,683.00 for the overtime pay and living expenses of the two supervisors.

Plaintiff originally brought suit to recover payments for the full thirteen week period. This claim has been voluntarily relinquished, and instead the plaintiff asks for summary judgment for the sums set out above — those due up to the date of termination.

The defendant does not dispute these facts, nor for that matter any of the historical facts. Indeed, the defendant has moved for summary judgment. However, the defendant maintains that the $60,000.00 payment paid in consideration for the rider of February 18, 1967, should be applied to the sums due and unpaid up to the termination date. And if this payment is so applied, then, in effect, there is a cancellation of the debt.

The fact that both parties have moved for summary judgment does not establish, of itself, that there is no issue of material fact and thus require that judgment be granted for one side or the other. *American Fidelity and*

Casualty Co., Inc. v. London and Edinburgh Ins. Co., 354 F. 2d 214 (4th Cir. 1965). It must be clearly shown by the moving party that there is no issue as to any material fact. Rule 56(c), F.R. Civ. P. And not only must the facts be free of controversy there must be no controversy as to the inferences to be drawn from them. *Cram v. Sun Ins. Office Ltd.*, 375 F. 2d 670 (4th Cir. 1967).

Here the plaintiff has supported its motion for summary judgment by affidavit wherein is contained a statement of facts as they relate to the contract and the subsequent riders. The defendant's motion incorporated by reference the essential facts set out in the plaintiff's papers, and none of the facts relating to either the contract itself or relating to the circumstances surrounding the contract was called into dispute. At the hearing of this motion, the defendant opposed the granting of summary judgment on the basis that the determination of how the $60,000.00 was to be applied under the contract involved the interpretation of the contract, and, consequently, was an issue of fact not to be determined by the court.

The defendant's objection necessitates a clarification of the question presented to the court. If a genuine issue as to the intentions of the parties was demonstrated, as evidenced by unclear and/or by ambiguous language in the agreement and/or by some extrinsic facts, then summary judgment would not be in order for a question of fact would exist as to the proper interpretation to be considered by the court in construing the contract of the parties. The distinction between interpreting an agreement to arrive at the intention of the parties and the construing of an agreement to define the legal obligations and rights which flow therefrom is important. The line of demarcation between the two steps must be drawn for in summary judgment proceedings it is not within the province of the court to determine the intentions of the parties when such are in dispute.

> "The question of interpretation of language and conduct — the question of what is the meaning that

> should be given by a court to the words of a contract, is a question of fact. . . . There is no 'legal' meaning, separate and distinct from some person's meaning in fact." Corbin, 3 Contracts § 554 (1960); *Lamb v. Norcross Bros. Co.*, 208 N.Y. 427 (1913).

Here the court is not presented with the problem of interpretation, as that term is defined above. The court finds that a reasonable man reading the clear language of the contract could determine the issue before the court in only one way. The four corners of the instrument do not present an ambiguity which would warrant this court to hold that there is an inference that the defendant was to have the advance payment applied to payments and sums due and owing prior to termination. This, coupled with the fact that circumstances surrounding the execution of this integrated agreement are not in dispute, warrants this court's granting summary judgment to the plaintiff.

If the defendant has facts which would throw doubt on the language of the agreement, he has not come forward with the same. In *Minnesota Mining and Mfg. Co. v. United States Rubber Co.*, the court held "that mere denials unaccompanied by facts which would be admissible in evidence at a hearing are not sufficient to raise a genuine issue of fact." 279 F. 2d 409, 415 (4th Cir. 1960). In the same case the court quoted with approval *Bros. Incorporated v. W. E. Grace Mfg. Co.*, 261 F. 2d 428 (5th Cir. 1958):

> "But if, on the other hand, there is, by presentation of factual evidentiary details having the substantial characteristics of receivable evidence as compared with conclusions, a convincing showing that no real genuine controversy on the decisive facts exist, a mere formal denial is but a pretended one, and is insufficient. In that situation the respondent must come forward with facts of his own."

Since the amounts which were unpaid prior to the effective date of termination are not disputed, the court

will sign an order granting summary judgment to the plaintiff in the amount of $57,683.00, namely $51,000.00 for the three weekly unpaid weekly installments and $6,683.00 for the unpaid overtime pay and living expenses for the two supervisors with costs.

ORDER

(Filed October 11, 1967)

The above-entitled cause came before the Court on Plaintiff's Motion for Summary Judgment and Defendant's Cross Motion for Summary Judgment pursuant to Rule 56 of the Rules of Civil Procedure.

The facts necessary to the determination of this Motion appear in the Affidavits submitted by Plaintiff in support of its Motion and in opposition to Defendant's Motion for Summary Judgment and it has been established that there is no genuine issue as to any material fact; that the Defendant has no defense and that the Plaintiff is entitled to Summary Judgment as a matter of law. It is, therefore,

ORDERED, ADJUDGED AND DECREED that the Defendant's Motion for Summary Judgment is denied; that the Plaintiff's Motion for Summary Judgment be and the same hereby is granted to the extent that judgment be entered in favor of Plaintiff in the amount of Fifty-seven Thousand Six Hundred Eighty-three Dollars ($57,683), together with costs, and that the balance of the Plaintiff's claim, having been voluntarily dismissed be and it hereby is dismissed.

/s/ EDWARD S. NORTHROP,
United States District Judge.

Dated this 11th day of October, 1967.

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 11,928

LewRon Television, Inc.,
Appellee,
versus
D. H. Overmyer Leasing Co., Inc.,
Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore,
Edward S. Northrop, District Judge.

(Argued March 7, 1968. Decided September 24, 1968.)

Before BOREMAN and WINTER, Circuit Judges, and MACKENZIE, District Judge.

WINTER, Circuit Judge:

In a suit on a contract instituted by LewRon Television, Inc. ("LewRon"), plaintiff, against D. H. Overmyer Leasing Co., Inc. ("Overmyer"), defendant, the district judge granted LewRon's motion for summary judgment and entered judgment for $57,683, the full amount of LewRon's amended claim.[1] Correspondingly, the district judge denied Overmyer's cross-motion for summary judgment. Overmyer appeals, assigning as error the entry of judgment for LewRon and the denial of Overmyer's motion to strike one of LewRon's affidavits filed in the proceeding. We reverse the judgment and remand the case for trial on the merits.

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[1] The suit was instituted in the Superior Court of Baltimore City. After plea, Overmyer removed the action on the basis of diversity of citizenship and the amount in controversy.

The circumstances which led to the making of the contract was the attempt by Overmyer to organize a new television network. The first program was to be a two-hour show originating from Las Vegas, Nevada. To further its project, Overmyer entered into a contract with LewRon for the leasing of remote color television equipment and facilities.

The contract, dated October 17, 1966, provided that LewRon would lease certain television equipment and provide operating personnel to Overmyer for a period of thirteen weeks, beginning no later than March 20, 1967. Overmyer agreed to pay LewRon the sum of $17,000 per week, commencing April 3, 1967, and also to pay overtime, living expenses and costs of travel of the personnel furnished by LewRon under certain circumstances. Overmyer had the right to postpone the starting date for the use of the equipment and personnel for a maximum period of six months; it had the right to extend the agreement for additional thirteen week periods until April 3, 1974, subject to adjustment of rental payments; and it had the unconditional right to cancel the contract at any time on thirty days' written notice, in which event its liability would be limited to payments due for the balance of the then current thirteen week cycle, provided that if cancellation occurred prior to April 3, 1967, Overmyer would be liable for the payments for the first full thirteen week period.

Subsequently, the parties entered into several "riders" amending the October 17 contract in several regards. The first rider, dated November 22, 1966, refined and restated certain provisions of the October 17 contract, corrected certain typographical errors therein, and made some substantive changes not of particular significance in this proceeding. The second rider, dated February 18, 1967, together with the third rider, dated March 16, 1967, made substantive changes. They may be considered together because the provisions of the third rider which are pertinent here only changed the dates for the doing of certain acts as set forth in the second rider.

The second and third riders gave Overmyer the right to use the facilities prior to the beginning of the initial thirteen week period. Whether used or not Overmyer agreed to pay a daily charge of $2,000, and the riders provided for a deposit of $37,000 in escrow to secure such charges. More importantly for present purposes, the second and third riders reduced Overmyer's liability to LewRon, in the event that Overmyer exercised the option in the October 17 contract to cancel it, if Overmyer exercised its option either before the beginning of the initial thirteen week period or during the initial thirteen week period.[2] If Overmyer elected to cancel at either time it was also given the right to terminate the agreement on seven days' prior written notice, as distinguished from the previous provisions re-

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[2] The full text of the cancellation provisions set forth in the second rider, as amended by the third rider, is as follows:

"13. Any provisions to the contrary notwithstanding, Overmyer shall have the right:

(a) Prior to May 1, 1967 to terminate this agreement on 7 days' prior written notice to LewRon, in which event Overmyer's liability shall be limited to payment due hereunder prior to May 1, 1967, *and in no event shall LewRon be required to refund any payments theretofore made to LewRon hereunder.*

(b) During the 13 week period commencing May 1, 1967 to terminate this agreement on 7 days' prior written notice to LewRon, in which event Overmyer's liability shall be limited to payments due prior to the effective date of said 7th day notice, *and in no event shall LewRon be required to refund any payments theretofore made to LewRon.*

(c) At any time after the 13 week period commencing May 1, 1967 to terminate this agreement on 30 days' prior written notice to LewRon, in which event Overmyer's liability shall be limited to the payments set forth herein for such balance as may remain of the then current 13 week cycle. In such event, LewRon agrees to exert its best efforts to utilize the facilities elsewhere, and all net revenues and savings shall reduce Overmyer's obligations under this subparagraph (c). Net revenue is gross revenue less direct costs of performing the job; and principle [sic] and interest is not included in these direct costs. 'Best efforts' which are required to minimize Overmyer's loss shall not be to the detriment of the other mobile units then owned and operated by LewRon." (Emphasis supplied.)

quiring thirty days' prior written notice if cancellation occurred either before or after the initial thirteen week period. Should Overmyer exercise its right to cancel prior to the beginning of the initial thirteen week period, the second and third riders limited its liability to payments due under the agreement prior to the beginning of the thirteen week period, with the provision that "in no event shall LewRon be required to refund any payments theretofore made to LewRon hereunder." Should Overmyer elect to cancel the agreement during the initial thirteen week period, Overmyer's liability was limited to payments "* * * due prior to the effective date of said 7th day notice, and in no event shall LewRon be required to refund any payments theretofore made to LewRon."

The February 18 rider required Overmyer to pay $60,000 to LewRon as a condition precedent to the effectiveness of the rider; it is undisputed that this sum was paid. According to the terms of the rider, this payment was "the consideration for the rider." The payment was not absolute, however, because the rider also provided with regard to the payment of rent for the initial thirteen week period that LewRon would credit Overmyer with $9,000 against the rental payment for the 10th week, and $17,000 for the rental payments due on the 11th, 12th and 13th weeks. These credits aggregate $60,000. Thus, Overmyer's payment of $60,000 was to be applied fully against the last maturing installments of rent due during the initial thirteen week period when they became due. As later facts will show, it is this aspect of the two riders which is the crux of this case.

Prior to the execution of the February 18 rider, Overmyer was attempting to assign the contract to United Network Company, a limited partnership; but apparently an impediment to the assignment was the substantial liability — the full $221,000 rent for the first full thirteen week period if cancellation occurred before performance began — placed on Overmyer by the initial contract. The February 18 rider was the fruit of a bargaining session between the parties, held in New York City, which began on the

evening of February 17 and continued until 4:00 A.M. on the morning of February 18, having as its purposes the attempt to resolve this problem.

Subsequent to the execution of the second rider but prior to the execution of the third rider, Overmyer did assign the contract to United, but LewRon did not agree to a novation so that Overmyer remained liable in the event of a default.[3] United Network did default and went into bankruptcy. By telegram, dated June 2, 1967, Overmyer exercised its right to cancel the contract.

June 2, 1967, was during the initial thirteen week period of the contract, as amended by the several riders. It is undisputed that, at the time of the effective date of termination, LewRon was entitled to be paid $51,000 in rental payments and $6,683 for the overtime compensation and living expenses of the two supervisors.[4] If the advance payment of $60,000 made by Overmyer at the time the February 18 rider became effective is applied against this liability, Overmyer owes no further sums to LewRon and, indeed, may be entitled to a judgment for the difference between the sum thereof — $57,683 — and $60,000. But whether, under the contract documents, the $60,000 may be so applied, is the question for decision.

Recognizing that the fact that both parties had moved for summary judgment did not of itself establish that there was no dispute of material fact or require that judgment should be entered for one side or the other as a matter of law,[5] the district judge concluded that the contract documents provided no basis on which the court could conclude that the $60,000 advance payments could be credited to sums due and owing by Overmyer to LewRon prior to termination. The district judge appears to have rested his decision upon the provision of the February 18 rider that

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[3] United Network also executed the third rider to evidence its assent thereto.

[4] It is also undisputed that charges incurred by Overmyer prior to the beginning of the original thirteen week period had been paid.

[5] *American Fidelity & Cas. Co. v. London & Edinburgh Ins. Co.*, 354 F. 2d 214 (4 Cir. 1965).

the payment of $60,000 was "the consideration for the rider." In this we think the district judge erred.

We agree that, simply because both parties moved for summary judgment, it does not follow that summary judgment should be granted one or the other. It is significant that in all of the affidavits in support of and in opposition to the motion and cross-motion for summary judgment, including the affidavit which Overmyer contends the district court erroneously refused to strike, there is an almost total lack of reference to the contemporaneous statements of the parties, memoranda or correspondence which passed between them, their subsequent acts or their negotiations prior to agreement on the rider — in short, any extrinsic aids in the construction of the contract documents — to shed light on how the advance payment of $60,000 was to be treated in the event that, as happened here, Overmyer exercised the right of cancellation during the initial thirteen week period. While the intention of the parties is to be drawn primarily from the documents themselves, that is the language that the parties employed, that language is not so clear and unambiguous that the parties' intention as to how the $60,000 payment was to be treated, and whether or not it was to be applied to the liability accruing up to the effective date of cancellation, is apparent.

While the making of the $60,000 payment was unquestionably one element of the consideration for LewRon's agreement to the February 18 rider,[6] it may be argued from the language of the document with equal force that this rider, and the March 16 rider, treated this advance payment simply as security for future liability to be incurred. Certainly, the entire sum of $60,000 was to be credited against the last maturing installments of rent and other

[6] Consideration may also be found, *inter alia*, in Overmyer's promise to pay the daily $2,000 charge referred to in the text, deletion of Overmyers' right to postpone the effective performance date of the contract, deletion of Overmyer's right after performance of the contract had begun to suspend its operation for designated periods at reduced liability, and for forfeiture of Overmyer's initial deposit of $11,050 unless Overmyer elected to extend the contract for at least two thirteen week periods.

payments due during the initial thirteen week period if they fell due. Thus, rather than an absolute payment to induce LewRon to agree to the February 18 rider, the $60,000 may have been an advance payment of sums to become due when performance of the contract was undertaken. The payment of $60,000 as *security* for future rent, when previous liability for future rent was unsecured, would have constituted the payment consideration for the rider to the same extent as absolute payment of that sum.[7] But what was to happen to the $60,000, if, by reason of exercise of the contractual right to cancel, those installments never became due? In that event, was the $60,000 subject to the "no refund" provisions of the riders? The contract documents contain no explicit provision limiting the security solely to the last maturing installments of rent in the event of cancellation before or during the first thirteen week period; nor do they explicitly say that the $60,000 should be applied to anything other than these installments should they mature. Thus, the contract documents do not reflect clearly the intention of the parties as to the application of the $60,000 when, as happened, the right to cancel, before or during the initial thirteen week period, was exercised. Resort must be had to extrinsic aids to construction and the parties given the opportunity to develop them at trial. Particularly is this so when the record shows that the crucial February 18 rider was not

[7] The district judge stressed that the effect of the February 18 rider was to reduce Overmyer's liability if it cancelled during the initial thirteen week period below its potential liability under like circumstances under the October 17 contract. He appeared to think that this fact proved that the payment of $60,000 was absolute. LewRon pressed on us the same argument. We do not think that the conclusion necessarily flows from the premise. Although the record is slim, Overmyer clearly was experiencing difficulty in accomplishing its project. Although LewRon may have given up a valuable right when it agreed to the February 18 rider, it could well have concluded that had it stood on its original contract it would make it impossible for Overmyer to achieve its objective and thus LewRon would forfeit the promise of an even better life to come. The effect of the February 18 rider to reduce Overmyer's liability if it cancelled is, therefore, only one circumstance to be considered in determining the intention of the parties.

entered into lightly but, rather, as a result of a prolonged bargaining session.

Overmyer presses on us the argument that the October 17 contract by its terms provides that it shall be interpreted under the laws of the State of New York, and this provision survived the successive amendments. When McKinney's Consolidated Laws of New York, General Obligations Law, § 7-101, is considered, there is found, so the argument runs, a legal consideration which requires that summary judgment be awarded Overmyer. Summarized, that statute provides that money deposited or advanced on a contract for the use or rental of *personal* property to be applied upon such contract when due shall continue to be the money of the person making such deposit or advance *"until repaid or so applied"* (emphasis supplied). The statute renders expressly void any contractual provision purporting to waive any pro ision of the statute. Overmyer concludes that if the $60,000 was security for or prepayment of future rent payments, New York law requires that it remain the property of Overmyer and be applied to its obligations.[8]

Section 7-101 has not been judicially construed in any reported opinion. New York courts have, however, rendered several decisions involving the counterpart statute, § 7-103, which applies to *real* property. In *Mallory Associates v. Barving Realty Co.*, 300 N.Y. 297, 90 N.E. 2d 468 (1949), the New York Court of Appeals held that the real property statute applied to leases of real property located outside of New York where there were significant New York contacts. The case suggests that, absent significant New York contacts, the New York personal property, statute may be inapplicable. But on the record before us the presence or absence of significant New York contacts, and particularly the whereabouts of the $60,000 payment is not

[8] Of course, the logical result of the holding would be to permit Overmyer any portion thereof in excess of the $57,683 which it owed. Curiously, in the proceedings below and before us, Overmyer did not seek judgment for the difference.

fully developed.[9] *19 South Main Street Corp. v. Rockland Secretarial School, Inc.*, 24 A.D. 465, 260 N.Y.S. 2d 264 (1965), because of its brevity is inconclusive, but it suggests that application of the real property statute, and by a parity of reasoning the personal property statute, may depend in part on the intention of the parties as to the purpose of the payment.

Resolution of the applicability and meaning of the New York statute must await full development of the facts in the light of the authorities to which we have referred and others which counsel may invoke at the time of trial.[10]

Because of our conclusion that summary judgment was inappropriate, it is unnecessary to consider Overmyer's contention with regard to its motion to strike one of LewRon's affidavits.

REVERSED and REMANDED

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[9] The contract provides that it shall be interpreted by the laws of the State of New York. Presumably, this means *all* of the law of New York, including New York's choice-of-law rules.

[10] As an additional aid to determining the parties' intention as to the $60,000, fruitful inquiry may be made as to whether LewRon commingled the $60,000 with other funds and whether Overmyer, if it had knowledge of the commingling, took any action to recover them. Under New York law the consequences for commingling funds to which the statute applies may be grave. The commingler is "subject to criminal prosecution if * * * he has appropriated the fund to his own use." *People v. Horowitz*, 309 N.Y. 426, 131 N.E. 2d 715 (1956). Since any such commingling is deemed to be a conversion, the depositor is entitled "to immediate recovery of the deposit intact." *In re Perfection Technical Services Press*, 22 A.D. 352, 256 N.Y.S. 2d 166 (1965). So strict are the controls upon the deposit that "it may not be used by the depositee as either a forfeiture, liquidated damages or an offset." *Freedman v. Washington Square Management Corp.*, 187 N.Y.S. 2d 888, 892 (Sup. Ct. 1959), cited with approval in, *In re Perfection Technical Services Press, supra.* Inaction by Overmyer when it knew of commingled funds might thus be strong evidence that it did not intend the $60,000 to constitute the type of payment to which the statute applied.